

HUMAN SERVICES BOARD

INTRODUCTION

DISCUSSION

Your son, PL, was discharged on May 28, 2008, after hospitalization in the Springfield Hospital and the Brattleboro Retreat for a serious drug overdose on May 25, 2008. He was discharged to your custody Against Medical Advice from the Retreat, and the recommendation was that you should seek increased wrap-around services and care for him. The specific understanding of the Department was that a drug and alcohol assessment be scheduled. The Retreat reported concerns that PL's drug use might lead to inadvertent overdose. You were reported to be "terrified" about this and to be ready to

pursue outpatient treatments when he was discharged from Brattleboro Retreat. Despite urgings by the Department, no further alternative therapeutic appointments were scheduled until 08/14/08, more than ten weeks after the discharge date, and shortly after the Department made its final assessment of risk on August 6, 2008. Since August 14, regularly weekly appointments have been kept and, according to you PL is now making progress. There was evidence at the time of the immediate incident that you showed an inconsistent attitude to PL's marijuana and other drug use and to his possession of drug paraphernalia and firearms. During the ten week period during which PL received no drug and alcohol assessment following his overdose it is reasonable to believe, supported by statements in his discharge document, that he was at risk of further serious physical harm.

The following facts have been submitted by the

Department in its **Response to Motion for Summary Judgment and**

Statement of Undisputed Facts:

1. DCF agrees that on May 25, 2008 PL overdosed and was taken to the Springfield Hospital. DCF disagrees with the remainder of #1 and states the following: The incident was reported to DCF by Springfield Hospital staff [P.A.H.]. Tox screens indicated substances other than Xanax including cocaine, marijuana, Benzodiazepine in the system of PL on May 25, 2008. DCF Ex. 1 and 3. Hospital staff and police were concerned with mother's permissive attitude toward PL's marijuana use. DCF Ex. 1, 3, and 4.

2. DCF agrees that PL was transferred from the Springfield Hospital to the Brattleboro Retreat on May 25, 2008. Brattleboro Retreat Discharge Summary shows an admission date of May 26, 2008 and a discharge date of May 28, 2008. DCF agrees PL reported to [Dr. B] he had taken his sister's Xanax "to get high". However, PL further stated to [Dr. B] that while he did not remember how many Xanax he himself had taken, he had sold and given away some of his sister's 30 Xanax. He also acknowledged use of cocaine on occasion and marijuana daily. Petitioner's Ex. #1 p.2 DCF's Ex 7 p.2.

3. DCF agrees that PL was discharged from the Retreat on May 28, 2008 Against Medical Advice (hereafter AMA). DCF disagrees the AMA discharge was only concerned with the possibility of another unintentional overdose. The Retreat was concerned with the increased risk of substance abuse, relapse and another unintentional overdose. Petitioner's Ex 2.

4. DCF disagrees that [petitioner] had no ability to keep her son at the Retreat on May 28, 2009 (sic). DCF agrees that [petitioner] did not have the authority to legally consent to her son remaining at the Retreat on an involuntary basis. She did have the ability to persuade him to remain at the Retreat voluntarily to receive the recommended treatment. She reported to DCF that she did not think the Retreat was much help and did not want PL around people at the Retreat. DCF Ex. 10.

5. DCF agrees that the After Care Plan from the Retreat contained a number of recommendations. DCF disagrees with the facts and characterization of the Retreat After Care Plan. Those recommendations were delineated on page 2 of the After Care Plan and included the following: weekly outpatients substance abuse treatment, weekly family therapy, close supervision before and after school, recommended continual adult supervision 24/7 for the first two weeks and then a reassessment of safety and compliance, recommended a CHINS petition and DCF supervision if PL not willing to follow parent's expectations. Petitioner's Ex. 4.

6. DCF does not agree that PL met with [school guidance counselor] on May 29, 2008. While the Retreat Discharge Summary shows an appointment for May 29, 2008 there is no documentation that said appointment was kept. HCRS records show no appointment on May 29th. See DCF Exhibits 13 and 14. DCF agrees that [petitioner] reported PL was being supervised by family members in the weeks after he left the Retreat, and further that [petitioner] reported his HCRS counselor was not a good match.

7. DCF disagrees that PL did well during June 2008. On June 13, 2008 he arrived at school under the

influence of marijuana and was removed from school. DCF Exhibit #2 His mother acknowledged his continued use of drugs to school personnel on June 13, 2008. See Petitioner's Exhibit #7 and DCF Exhibit #2. The Coordinated Plan of Services was to address PL's emotional and educational needs in the school environment based on his ADHD and previously diagnosed conditions. The mental health needs determined by the Retreat were in addition to the IEP and Service Plan previously put in place by the School. Petitioner's Ex 4

8. DCF disagrees that the investigation was not opened until June 17, 2008. DCF investigation was opened May 30, 2008. DCF Exhibit 1. DCF aggress Investigator [T] visited [petitioner] in her home on June 17, 2008 and observed PL playing video games. DCF does not agree with the characterization that no abuse or neglect was observed. [Petitioner] agreed on June 17, 2008 to schedule a substance abuse evaluation for PL at HCRS in Springfield within a week. [Petitioner] was advised that DCF would inquire to see if the evaluation had been scheduled. Petitioner's Ex. 8 Follow ups to this June 17th visit were unable to confirm a substance abuse evaluation or weekly outpatient therapy. DCF Exhibit 10 9. DCF agrees that on August 14, 2008 [petitioner] was substantiated for risk of harm. DCF disagrees that the only reason for the ROH substantiation was the failure to have a substance abuse evaluation scheduled by August 6, 2008. Petitioner's Ex. #4 and 12

10. DCF agrees that on August 14, 2008⁹ a drug and alcohol assessment was performed on PL at HCRS. That assessment was not received by DCF until May 14, 2009. DCF disagrees with petitioner's characterization of the severity profile that found two of six factors low and four severity profiles medium to moderate. Petitioner's Ex 11, DCF Ex 11

11. DCF agrees that on October 15, 2008 DCF upheld the substantiation for ROH against [petitioner]. DCF disagrees that the basis for the substantiation was only the delay in obtaining the drug and alcohol assessment in addition to the delay in obtaining the drug and alcohol assessment of PL. [Petitioner], despite

department urgings, did not schedule other recommended therapeutic appointments for her son during the ten week period. These were the recommendations of the Retreat, and the recommended After Care Program that [petitioner] agreed to put in place. Petitioner's Exhibit 12.

Abuse and neglect are specifically defined in the registry statutes, in pertinent part, as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare.

. . .

(4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

33 V.S.A. § 4912

Unfortunately, this appears to be another "in plain sight" case¹ in which the alleged "abuse" took place with the full knowledge and awareness of a Department investigator, the alleged victim's medical providers, and school personnel. The facts appear undisputed that neither the Department's investigator nor any other of these individuals took any legal action, or attempted any other official intervention in the child's behalf during the time in question, May 25 through August 6, 2008, other than the Department's eventual

¹ See Fair Hearing Nos. 21,063 and 21,264.

decision to "substantiate" the petitioner for child abuse. Again, it must be concluded that it is patently inconsistent, unfairly punitive, and otherwise contrary to underlying statutory purposes and public policy to hold a parent liable for "child abuse" in such circumstances.

Included in the CHINS statutes, at 33 V.S.A. § 5106, the Commissioner of DCF has the following "powers and duties":

Subject to the limitations of the juvenile judicial proceedings chapters or those imposed by the court, and in addition to any other powers granted to the commissioner under the laws of this state, the commissioner has the following authority with respect to a child who is or may be the subject of a petition brought under the juvenile judicial proceedings chapters:

- (1) To undertake assessments and make reports and recommendations to the court as authorized by the juvenile judicial proceedings chapters.
- (2) To investigate complaints and allegations that a child is in need of care or supervision for the purpose of considering the commencement of proceedings under the juvenile judicial proceedings chapters.

Those statutes, at 33 V.S.A. § 5102(3), include in the definition of a "child in need of care or supervision (CHINS)" a child who:

(B) is without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being.

If there is a discernable difference in legislative intent or public policy between the above-cited CHINS and

abuse-registry statutes regarding a parent's responsibility to provide medical care for a child, or the Department's assessment of "risk of harm" to a child if such care is not provided, the Department has not said what it is. In light of the above statutes, it must be concluded that the Department's inaction during the months in question essentially resolves the legal issue in this matter. If the petitioner's actions or inactions during this period were not, in the Department's view, sufficient in terms of "risk of harm" to the child at the time to trigger the Department's statutory duty and responsibility to file a CHINS petition in the child's behalf, the Department cannot "substantiate" the petitioner for having perpetrated "child abuse" during the same period of time, on the basis of the same facts, and under a seemingly-identical legal standard.

ORDER

The Department's decision substantiating the report of child abuse in question is reversed.

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